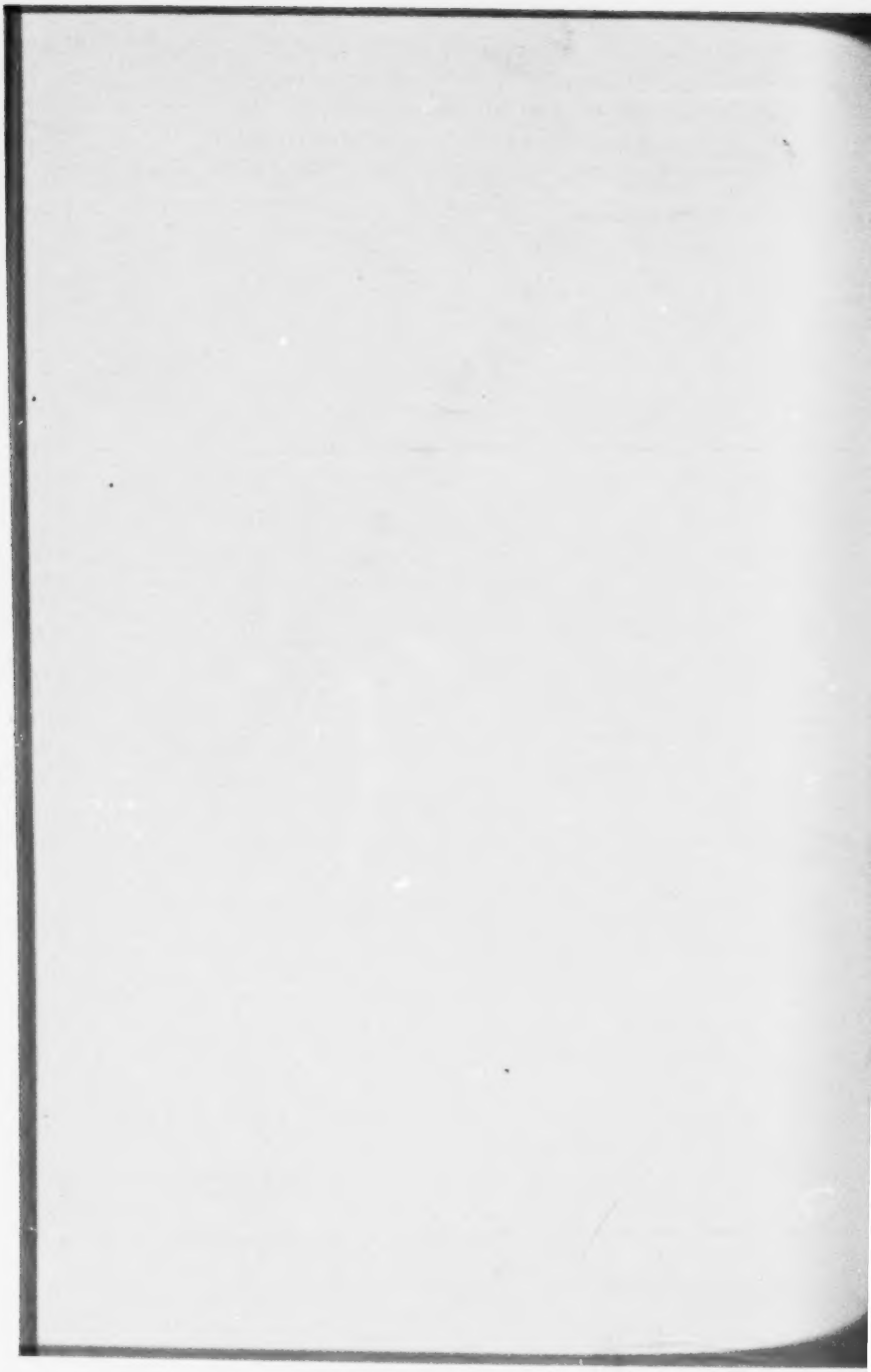

No. 1899 26

Supreme Court of the United States.

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October Term, 1899.

No. 187

Brief of Kneeland for Appellees.

GEORGE W. CROSSMAN *et al.*,

Petitioners and Appellants.

Filed Mar. 7, 1900.

versus

WILLIAM BURRILL *et al.*,

Appellees.

BRIEF FOR APPELLEES.

LAWRENCE KNEELAND,

of Counsel.

JOHN POLHEMUS PRINTING COMPANY, Printers and Mf'g Stationers, 121 Fulton Street, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1899.

GEORGE W. CROSSMAN *et al.*,
Petitioners and Appellants.
vs.
WILLIAM BURRILL *et al.*,
Appellees.

No. 187.

BRIEF FOR APPELLEES

Statement.

The above cause comes before the Court by virtue of a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals reversed the decree of the District Court for the Southern District of New York dismissing the libel, and directed that Court to decree in favor of the appellees for fifty-three days' demurrage, amounting to $3,151.

The libel was filed by the appellees, owners of the Bark *Kate Burrill*, to recover from the respondents fifty-three days' demurrage, under a written charter-party of said vessel, entered into between the libellants and the respondents, on March 7, 1893, for a voyage from Pensacola to Rio de Janeiro, by which the respondents engaged to provide a full and complete cargo of lumber,—

> "Cargo to be furnished at port of loading at the average rate of not less than (20 M.)

Twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at Port of Destination at the average rate of not less than (20 M.) Twenty thousand superficial feet per running day, Sundays excepted.

Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent ($59.46/100) Fifty-nine 46/100 dollars U. S. Gold (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage ground in Rio Bay designated by Charterers.

The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in Charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed.

The vessel to be consigned to Charterer's agents at port of discharge, inwards only, paying them a consignment commission of 2½ per cent. on the amount of this charter, for doing vessel's inward business.

The dangers of the seas, fires, and navigation of every nature and kind, always mutually excepted."

The respondents shipped at Pensacola 534,194 feet of lumber, of which 67,333 feet were on deck, and bills of lading for said cargo were presented by the respondent to the master and signed by him on May 5, 1893.

The bills of lading provided that said cargo should be "delivered in the like good order and "well conditioned, at the aforesaid port of Rio de "Janeiro (the dangers of the seas, fire and collision "excepted) unto order or to their assigns, *they* "*paying freight for the said lumber as per charter* "*party dated 7th March, 1893*," and average ac- "customed."

These bills of lading were assigned by the respondent to the Companhia Industrial do Brazil, the respondent's agent at Rio, to whom the vessel was consigned, and were assigned by the latter company to Manoel da Cruz y Filho, purchasers of the lumber.

The vessel arrived at Rio on August 30, 1893, where she delivered 514,256 feet of lumber, a portion of her deck load, amounting to 19,939 superficial feet, having been lost by sea perils.

The original libel alleged that on the 4th day of September, 1893, notice in writing that the vessel was ready to discharge her cargo was duly given by the master to respondent's agent, who received the cargo, but did not discharge the same at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, but, on the contrary did not complete the discharge until Nov. 28, 1893, a period of fifty-three days, beyond the twenty-six days exclusive of Sundays, allowed by the charter, for which period libellants claimed demurrage at the charter rate of $59.46 per day.

The answer set up the following defenses:

(1) That by reason of the clause in the charter party "vessel to have an absolute lien upon the "cargo for all freight, dead freight and demurrage. "Charterer's responsibility to cease when the vessel "is loaded and bills of lading signed," all liability on the part of the respondents under said charter party had ceased, and it became the duty of the master to hold the cargo until the demurrage was paid by the consignees of the cargo.

(2) That the owners of the cargo were prevented from removing the cargo from the vessel sooner than they did by reason of the acts of the public enemy, to wit, certain vessels of war which were then in Rio harbor and making war upon the Government of Brazil.

(3) The payment to Phipps Brothers & Co., libellants' agents at Rio, by the consignees, of the sum of £515 6s. 5d., in full satisfaction of all claims under the charter party; the statement of an account between them, and the acceptance of said sum in full satisfaction.

Libellants filed exceptions to each of these defenses as insufficient in law and the case was heard in the District Court upon said exceptions.

The District Judge sustained the exception to the defense based on the "cesser clause" in the charter party; overruled the exception to the second defense, holding that the duty of the ship to deliver and that of the charterer to receive were concurrent duties, and that there was no "default" on the part of the charterer while the ship was unable to deliver; and that the libel did not allege actual readiness of the ship to deliver, but only that notice of readiness was given.

The exception to the third defense of accord and satisfaction was also overruled.

Libellants thereupon moved to amend the libel so as to set forth actual readiness of the ship to deliver at the time of the giving of notice on September 4th; the designation of an anchorage by charterer's agent; the hauling of the vessel to such anchorage on September 5th; the commencement of the discharge of the cargo on September 6th, and the particulars and dates of the discharge of the cargo thereafter. Also by alleging want of authority in the master or agents of libellants at Rio to make and state an account on behalf of the libellants, and that the payment to libellant's agent was for freight only.

This application was denied by the District Judge, who made a decree dismissing the libel. (Record 36.)

The libellants thereupon appealed to the Circuit Court of Appeals and in that court renewed the application to amend the libel, which application was granted. (Record 44.) The amended libel contains the following additional allegations: That the charter party provided "Vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers." (Record 46.)

That at the time of giving notice on Sept. 4th of readiness to discharge, the vessel was in fact ready to discharge upon charterer designating a safe anchorage for that purpose. (Record 46.)

That the charterer did designate an anchorage, and on September 5th the vessel proceeded thereto. That on September 6th the discharge of the cargo was commenced at such anchorage, continued on the 9th and proceeded with continuously from September 11th to September 30th; discontinued until October 16th, continued on the 17th, 23d and 27th of October, and 6th, 17th, 24th and 28th of November, when it was completed; that at all times when the discharge was suspended the vessel was ready and willing to proceed with same. (Record 46-47.)

That the total freight at charter rate amounted to £1390-6-5; that in November the respondents' agents made up an account of the amount of freight due, credited themselves with £875 paid on account, leaving a balance due for freight of £515-6-5, which sum they paid to libellants' agents at Rio on Dec. 7th. That no other account or payment was made for freight, no amount paid, or account stated, for demurrage, and that the sum of £515-6-5 was received in full of the freight and not otherwise. That on Dec. 12, the master appeared before the British Consul and made formal protest against the detention of the vessel, stating that he claimed demurrage amounting to $3,159.38, which the consignees refused to pay. (Record 47.)

It further alleges that neither the master nor the libellants' agent at Rio had authority to enter into any accord and satisfaction with the charterers or

to receive the sum paid for any other purpose than as payment of freight due under the charter. (Record 47–48.)

The answer of the respondents to the amended libel set up the same three defenses as were interposed to the original libel, namely: The "cesser clause" (Art. 14, Record 49), that the detention was caused by the acts of the public enemy (Art. 15, Record 49–50), an accord and satisfaction (Art. 16, Record 50).

Exceptions were filed by the libellants to these defenses, as insufficient in law, and said exceptions were argued before the Circuit Court of Appeals.

That Court sustained the exceptions to the fourteenth and fifteenth articles of the amended answer, which pleaded as defenses the "cesser clause" and the state of war existing at Rio; and overruled the exception to the plea of accord and satisfaction, holding that this question was one of fact to be determined upon a view of all the incidents of the transaction when the proofs were before the Court. (Record 54–59.)

Thereupon testimony was taken by both parties. Wilson, master, and William Burrill, managing owner of the vessel, being examined on behalf of the libellants, and Hime, Director of Companhia Industrial do Brazil, on behalf of the respondents.

This testimony bore upon the circumstances connected with the payment of £515-6-5 alleged by the respondents to be in settlement of all claims under the charter, and was also in support of the allegations of the amended libel respecting the discharge of the cargo, which the answer had denied.

The testimony established the following facts:

The arrival of the vessel at Rio on August 30th. (Wilson, 73; Hime, 66.)

That the master gave notice in writing to the consignees on Sept. 4th of readiness to discharge. (Wilson, 74; Hime, 70.)

At the time of giving such notice the vessel was, in fact, ready to discharge upon charterers designating an anchorage. (Wilson, 75; Hime 70.)

An anchorage was designated and the vessel hauled to such anchorage on September 5th. (Wilson, 74 ; Hime, 66.)

The discharge of the carge was commenced on Sept. 6th at the designated anchorage. (Wilson, 74; Hime says on Sept. 4th, 66.)

The cargo was discharged as follows:

September	6th,	150	pieces.
"	9th,	155	"
"	11th,	105	"
"	12th,	105	"
"	13th,	115	" completing deck load.
"	15th,	142	"
"	16th,	173	"
"	18th,	265	"
"	19th,	262	"
"	20th,	117	"
"	21st,	160	"
"	22d,	239	"
"	23d,	226	"
"	25th,	127	"
"	26th,	380	"
"	27th,	257	"
"	28th,	345	"
"	29th,	499	"
"	30th,	360	"
October	16th,	434	"
"	17th,	163	"
"	23d,	136	"
"	25th,	413	"
"	27th,	356	"
November	6th,	538	"
"	16th,	296	"
"	17th,	621	"
"	20th,	451	"
"	24th,	337	"
"	28th,	435	"

The cargo discharged at Rio contained 514,256 superficial feet. (Libel Art. IV. Ans. Article IV.)

At the rate of discharge stipulated in the charter, viz., "at the rate of not less than twenty thousand "superficial feet per running day, Sundays excepted," it should have been discharged within 26 days, excluding Sundays, from the date of giving notice of readiness on Sept. 4th. The lay days therefore expired on October 6th, after which date $59.46 per day, day by day, became due under the charter, for the 53 days down to Nov. 28, amounting to $3151.38.

The delay in discharging was in no manner due to any unreadiness on the part of the vessel or her master. (Wilson 77).

When the lay days expired the master called on the consignees and stated that he intended to claim demurrage and was told that he could not collect demurrage on account of the revolution. (Wilson 79).

Respondent's witness Hime admits that the master called on him about the delay in discharging and that he told him that he could not help him and that he had to obey the orders of the government (66).

No statement or account of demurrage claimed was presented by the master or by Phipps Bros. & Co. to the respondent's agents (67), the only statement rendered being the one prepared by the respondents' agent and rendered to Phipps Bros. & Co., accompanying the payment of the £515-6s. 5d. This statement appears at pages 69-70, and shows that the sum of £515 6s. 5d. was the exact amount of the freight as per charter party, less the amount of a prior payment on account.

POINTS.

I

The cesser clause in the charter party does not constitute a defense.

The charter party contains the following provisions:

> "For each and every day's detention by default of the said party of the second part of agent, $59.46 U. S. gold (or its equivalent) day by day shall be paid by the said party of the second part or agent to the said party of the first part or agent."
>
> "The bills of lading to be signed as presented, without prejudice to this charter."
>
> "Vessel to have an absolute lien upon the the cargo for all freight, dead freight and demurrage."
>
> "*Charterer's responsibility to cease when "the vessel is loaded and bills of lading are signed.*"

The bill of lading presented by the charterers and signed by the master recites the shipment by the charterers "to be delivered * * * at the aforesaid port of Rio de Janeiro unto *order or their assigns, they paying freight for the said lumber as per charter party dated 7th March, 1893*, and average accustomed. The answer alleges that the bills of lading were duly signed and delivered to Companhia Industrial do Brazil and were assigned and delivered by the latter to Manoel da Cruz & Filho who thereby became the consignees of said cargo. (49)

Both courts concurred in holding that the "cesser clause" did not constitute a defense to the libellants' claim.

The considerations upon which the District Judge based his decision, which were cited at length and approved by the Appellate Court, briefly stated, were as follows:

(1) The master was, under the terms of the charter party, required to sign bills of lading as pre-

sented by the charterers, but this was to be without prejudice to the charter.

(2) The bill of lading, not incorporating or referring to the charter provision as to demurrage, imposed no obligation upon the indorsee, who received the cargo under it, to pay the charter demurrage.

(3) The various provisions of the charter party are contradictory in form, but contemplated a lien by the ship-owner for the demurrage, and its proper construction, as a whole, required that the "cesser clause" should apply only so far as the charterers has secured to the ship-owner a lien co-extensive with the charterer's liability.

1 The captain was bound to sign the bills of lading as presented by the charterer.

Hanson v. *Harold* (1894), 1 Q. B., 612–618:

> Lord Esher. "The charter party provides "that the captain is to sign bills of lading "(Australian and New Zealand trade) ac- "cording to the custom of the port at the "current or any rate of freight that may be "required without prejudice to the charter- "party. It was argued that that enabled "the captain to say that he would not sign "bills of lading, unless they in terms gave "him all the rights which are given by the "charter-party--that the words without prej- "udice to the charter-party entitled the "captain to insist, and he ought to have in- "sisted, on the insertion in the bills of "lading of the words 'all other conditions "as per charter party.'
>
> "The meaning of these words has been "settled by decisions which cannot be "questioned. The meaning as settled by the "case of Shand *vs.* Sanderson, 28 L. J. Ex. "278, and Gledstanes *vs.* Allen, 12 C. B., 202, "is that it is a term of the contract between "the charterers and the ship-owners, that, "notwithstanding any engagements made "by the bills of lading, that contract shall

"remain unaltered. Therefore in this case "the captain was bound to sign the bill of "lading presented to him, but his doing so "was to be 'without prejudice to the char- "ter-party.' These words do not limit the "obligations under the charter-party to sign "the bills of lading presented to him, but "when he has done so, it does not affect the "contract contained in the charter-party. "If a ship-owner puts up a ship as a general "ship, he may insist on a bill of lading in "any terms he pleases, or he may refuse to "take the goods. Here the ship-owner de- "prives himself of that right and agrees to "sign bills of lading as presented. *There- "fore the captain was bound to sign the bill "of lading, as he did.*"

2. It is well settled that the indorsee of a bill of lading is liable only for the terms of the bill.

In this case the bill of lading required the delivery of the cargo *on payment of freight as per charter party.*

If the consignee had failed to receive the cargo within a reasonable time, in view of the existing conditions at the port of discharge, while he would have been liable for damages *in the nature of demurrage* for such detention, he was not liable for demurrage at the charter rate nor for the despatch provided for in the charter.

In re Bags of Linseed, 1 Black, 108–112.

"The rights of the parties in this case "depend altogether on the contract made "in the bill of lading. That instrument "does not refer to the charter party, nor "can the charter party influence in any de- "gree the decision of the question before "us. Augustine Wills was not a party to "it and it is not material to inquire whether "he did or did not know of its existence "and contents, for there is nothing in it to "prevent Wills & Co., the sub-charterers, "or Augustine Wills, the consignee, from "entering into the separate and distinct con- "tract stated in the bill of lading, and the

"assignee took the rights of Wills & Co.,
"in this contract and nothing more."

The *H. G. Johnson*, 48 Fed., 696.

Chappell v. *Comfort*, 10 C. B. (N. S.), 810.

This was an action against the indorsees of the bill of lading for demurrage at the port of discharge. By the charter party sixteen lay days were allowed for loading and unloading, and there was demurrage at 2 £ per day for any detention beyond that time. By the bill of lading the goods were deliverable to order "*paying freight as per charter party*," and there was also a memorandum written in the margin, "There are eight working days for "unloading in London."

Judgment was given for defendant.

Wills, *J.* "It may be, and it often does "happen, that the person who receives the "goods intends to pay all the charges men-"tioned in the charter party. But when it "is intended that such an obligation should "be imposed on him it should be done in "plain words, as was done in Wegener *v.* "Smith (15 C. B., 285) and other cases, "where by the terms of the bill of lading "the goods were made deliverable to order "'against the payment of the agreed freight "and other conditions as per charter party.' "* * * There must be a plain intention "expressed that the consignee of the bill of "lading is to pay demurrage before he can "be charged with it. This is an established "rule to which it is highly important to "adhere."

Smith v. *Sieveking*, 5 E. & B., 589.

The same rule was applied, where the language of the bill of lading was "*paying for the goods as "per charter party.*"

Fry v. *Chartered Bank of India*, L. R., 1 C. P., 689.

Gray v. *Carr*, L. R., 6 Q. B., 522, 543.

"It is clear that the plaintiff can only "have a lien for any of these claims" (demurrage, detention and dead freight) "by "express contract, inasmuch as the lien "which, as shipowner, he would have independently of any contract would only "extend to the actual freight of the goods "carried. * * * Further, although the "charter party may contain an express contract giving him such a lien on the goods "as against the charterer, yet he could not "have the lien as against the indorsee of a "bill of lading, unless it is stipulated for in "the bill of lading, either by the incorporation of the clause in the charter party, or "by its being expressly mentioned."

Dayton v. *Parke*, 142 N. Y., 391.

Action against consignees of a cargo of lumber shipped by charterers. The charter party provided for customary dispatch in discharging and that $52 should be paid for "each and every day's detention "by default of charterer or agent."

The bill of lading provided for delivery of the cargo to the consignee, they *paying freight as per said charter party and its conditions.*

It was held that the reference in the bill of lading to the charter party was confined to the conditions of the latter instrument as to the payment of *freight* and that the charter-party provisions as to demurrage were not made part of the bill of lading.

These cases are clearly opposed to the appellant's contention that the mention of the charter-party in the bill of lading in connection with freight was sufficient to impose its provisions as to demurrage upon the consignee.

The distinction between this case and cases where "all other conditions as per charter-party" is inserted in the bill of lading is a well-recognized one.

Porteous v. *Watney*, L. R., 3 Q. B. D., 534, 537.

"The cases of Chappell *v.* Comfort, 10 C. "B. (N. S.), 802; Fry *v.* Chartered Bank of

"India, L. R., I. C. P., 698; and Smith *v.*
"Sieveking, 4 E. & B., 945; 5 E. & B., 589,
"which have been cited on behalf of the
"defendants in the present case, so far from
"weakening the authority of Wegener *v.*
"Smith, 15 C. B., 285, appear to me to tend
"still further to strengthen it. In each of
"them the reference to the charter-party
"contained in the bill of lading was either
"expressly by the use of the words 'freight
"as per charter-party', as in the two first
"cases, or impliedly by the use of the
"words 'paying for the said goods as per
"charter-party', as in the last case, limited
"to the condition in the charter-party re-
"lating to freight, and was held to be made
"simply for the purpose of ascertaining the
"rate of freight, and not for the purpose of
"imposing an obligation upon the holder of
"the bill to perform the conditions of the
"charter-party generally."

3. The charter-party provides:

"Vessel to have an absolute lien upon the
"cargo for all freight, dead freight and de-
"murrage."

The action of the charterers in requiring the master to sign bills of lading not incorporating the demurrage provision, as has been shown, deprived the vessel of its lien for the demurrage.

The "cesser clause" immediately follows the above quoted stipulation for a lien and reads, "Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed." It should be noted that, when charter parties contain the "cesser clause" such clause is invariably coupled with a stipulation for a lien by the vessel for the charter liability, the manifest intention being to substitute, for the personal liability of the charterer, a lien upon the cargo commensurate or co-extensive therewith. When by the action of the charterer the lien of the vessel has been impaired, the "cesser clause" has uniformly been construed

to release the charterer from liability only in so far as he has secured to the vessel its lien.

The "cesser clause" is sometimes called the "lien and exemption clause." *Scrutton, Charter Parties and Bills of Lading* (1 Ed.), 101.

In *Hatton* v. *De Belaunzaran*, 26 Fed., 780, Judge Brown held charterers responsible for demurrage notwithstanding the "cesser clause" because under a re-charter of the vessel which the master was required to execute by virtue of the provision. "If required by charterers, captain to sign re-charter without prejudice to this charter," the vessel had been required to take a cargo of insufficient value at the port of discharge to pay more than the sub-charter freight.

In *Gray* v. *Carr*, L. R., 6 Q. B., 522-545, Channel *J.*, in discussing the "cesser clause", states:

> "We have been pressed in the argument "with the clause in the charter-party that "the charterers' responsibilities are to cease "on shipment of the cargo, provided it be "of sufficient value to cover the freight and "charges on arrival at the port of discharge. "It has been contended that all the char- "terers' responsibilities for all breaches of "contract were to cease on shipment; and "that therefore it must have been intended "that there should be a lien on the goods, "otherwise the shipowners would be without "remedy. It is not, of course, necessary "for us to decide whether the charterers "were or were not relieved from responsi- "bility in respect to the claims which we "now decide the shipowner cannot main- "tain against the defendants. * * * "*Probably the charterers' responsibilities* "*which are to cease are the responsibilities* "*in respect to those matters for which a lien* "*is created;* but the difficulties in the way "of creating a lien for unliquidated dam- "ages, and the stipulation that the cargo is "to be of sufficient value to cover the freight "and charges only, and not the freight, "charges and all damages, afford a stronger

"augument for holding that *there is no lien*
"*and therefore no cesser of responsibility*
"of the charterers as regards the damages,
"than for holding that there is a cesser and
"therefore a lien."

Francesco v. *Massey*, L. R, 8 Ex., 101–106.

Bramwell, *J.*: "It seems impossible to "hold that the matters as to which the lia-"bility was to cease were not the same as "the matters as to which the lien was "given."

Kish v. *Corey*, L. R., 10 Q. B., 553–559.

Brett, *J.*: "Three interpretations of the "clause may be suggested. By the first, "liability of every kind, as well for past as "for future breaches, is to cease, so far as "the Charterer is concerned. By the "second the Charterer is exempted only "from future liability—that is, after the "loading of the ship; but in each case the "ship-owner can enforce his remedy against "the consignee by his lien on the cargo. "By the third the Charterer's liability is to "cease, but only a partial remedy is given "to the ship-owner by the lien against the "consignee—that is, he can exercise his "lien for demurrage, but not for detention. "If this last were the legal interpretation of "the clause I should think it so unjust that "I should be prepared to overrule former "decisions, upon which it is based, for I "cannot think that it would express the "real intention of the parties."

Clink v. *Radford* (1891), 1 Q. B , 625.

Plaintiffs chartered their vessel to defendants to load a cargo of coal "in the usual and customary manner," and to deliver same at the port of discharge at the average rate of not less than 100 tons per working day, "the charterer's liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage."

Plaintiffs sued to recover damages for detention at the port of loading.

It was held that damages for undue detention at the loading port were not covered by the word "demurrage" in the lien clause, and that the "cesser clause" did not exonerate the charterers.

Lord Esher (627): "In my opinion the "main rule to be derived from the cases as "to the interpretation of the cesser clause "in a charter-party is that the Court will "construe it as inapplicable to the particu- "lar breach complained of, if, by construc- "ing it otherwise, the shipowner would be "left unprotected in respect of that par- "ticular breach complained of, unless the "cesser clause is expressed in terms that "prohibit such a conclusion. In other "words, it cannot be assumed that the "shipowner, without any mercantile reason, "would give up by the cesser clause rights "which he had stipulated for in another "part of the contract. If that be true, then "the question in this particular case, as in "every other case, will depend upon this, "whether if we apply the cesser clause to "the particular breach complained of, and "so hold the charterer to be free, the ship- "owner has any remedy for his loss. If he "has, we should construe the cesser clause "in its fullest possible meaning, and say "that the charterer is released; but if we "find that, by so construing it, the ship- "owner would be left without any remedy "whatever for the breach, then we should "say that it could not have been the mean- "ing of the parties that the cesser clause "should apply to such a breach."

Bowen, L. J. (629): "The cesser clauses, "as they generally come before the courts, "are clauses which couple or link the pro- "visions for the cesser of the charterer's "liability with a corresponding creation of "a lien. There is a principle of reason "which is obvious to commercial minds, "and which should be borne in mind in "considering a cesser clause so framed, "namely, that reasonable persons would "regard the lien given as an equivalent for

"the release of responsibility which the "cesser clause in its earlier part creates, "and one would expect to find the lien "commensurate with the release of liability. "* * * That being the principle of con- "struction to apply, one would not expect "to find a shipowner placing his ship and "himself at the mercy of a charterer with- "out some equivalent, or contracting on a "given event to release the charterer from "all liability unless there was some other "method of protecting himself against the "act of the charterer."

Fry, L. J. (9632): "The rule that we are "*prima facie* to apply to the construction "of a cesser clause followed by a lien clause "appears to me to be well ascertained. "That rule seems a most rational one, and "it is simply this, that the two are to be "read, if possible, as co extensive. If that "were not so we should have this extraor- "dinary result: there would be a clause in "the charter-party the breach of which "would create a legal liability, there would "be a cesser clause destroying that liability, "and there would then come a lien clause "which did not re-create that liability in "anybody else. What would be the use of "a stipulation if the moment it was created "it was taken away and was not laid upon "some one else's shoulders? Such a con- "struction would strike anyone as being "most unreasonable, and therefore it is not "one which the Court ought to adopt unless "absolutely driven to it."

In *Hansen* v. *Harrold* (1894) 1 Q. B., 612, the same Court further considered the effect of the cesser clause where the freight payable under the bill of lading for cargo shipped under a sub-charter did not equal the charter freight. The charter provided that the charterers might re-charter at any rate of freight without prejudice to the charter party, captain to sign bills of lading at any rate of freight required without prejudice to the charter-party; "the liabilities of the charterers to cease on "the vessel being loaded, the master and owners

"having a lien on the cargo for all freight and de-
"murrage under this charter party." The bill of lading did not refer to the charter party.

The charterers were held liable for the difference in freight.

Lord Esher: (617)

> "We have to construe the different "parts of this contract having regard "to the other parts of the contract "dealing with the same subject matter. "The stipulation that the freight should be "a lump sum of 4000 l. *prima facie* imports "a contract to pay such portion of that sum "as might not have been paid in accordance "with the terms of the charter party at the "port of loading, when the ship arrived at "the port of discharge.
>
> "A stipulation for the cesser of the lia-"bility of the charterers as soon as the "cargo is loaded, if it stood alone, would be "entirely in favor of the charterers, and is "one which, it is obvious, the shipowner "would not agree to, unless it was coupled "with something else, viz., that the master "and owners were to have a lien on the "cargo for the charter-party freight. Taking "the two branches of the clause together, "what is their true construction? They "must be construed according to the rule in "*Clink* v. *Radford*."

After quoting from his opinion and that of his associates in that case, he proceeds:

> (618) "It seems to me that this reasoning "has not been and cannot be answered. "Therefore the proposition is true that "where the provision for cesser of liability "is accompanied by the stipulation as to "lien, then the cesser of liability is not to "apply in so far as the lien which by the "charter party the charterers are able to "create, is not equivalent to the liability of "the charterers.
>
> "Where in such a case, the provisions of "the charter party enable the charterers to "make such terms with the shippers that "the lien which is created is not commen-"surate with the liability of the charterers

> "under the charter party, then the cesser
> "clause will only apply so far as the lien
> "which can be exercised by the shipowner
> "is commensurate with such liability."

Davey, L. J. (620–1).

> "It is to be observed that the words
> "'the master and owners having a lien'
> "&c. do not create a lien; the lien
> "arises subsequently on the goods being
> "shipped, and could only in this case
> "come into operation when the vessel was
> "re-chartered. * * * They im-
> "port, in my opinion, a contract to give or
> "procure a lien. I should myself think it
> "a reasonable construction to hold that the
> "creation of a lien was a condition precedent
> "to the cesser of liability, the effect being
> "that the liability of the charterers would
> "only be discharged in so far as it was re-
> "placed by the lien. I do not desire, how-
> "ever, to rest my judgment on that ground,
> "because it is not the view adopted in the
> "earlier cases, and it is not necessary to
> "adopt it for the purposes of this case. It
> "is sufficient to say that the two branches
> "of the clause thus linked together form
> "correlative stipulations."

See also *Brankelow S. S. Co.* v. *Canton Ins. Co.* (1899) 2 Q. B., 178–184.

II.

The fact that the discharge of the cargo was prevented by reason of the acts of the public enemy, if established, would not constitute a defense.

The 15th Article of the amended answer alleges that "when said vessel arrived at Rio the owners of the cargo "used all reasonable diligence in and "about receiving the cargo shipped upon the said "vessel and removing the same therefrom.

"*That libellants were prevented from discharg-*
"*ing the same*, and respondents were prevented
"from receiving the same any sooner than they
"did, *by reason of the acts of the public enemy*,
"* * and that the detention alleged in the libel
"* * was caused by said acts of the public
"enemy *and not* by any default of the respond-
"ents.

"That the captain * * acquiesced in the de-
"lay and recognized the necessity therefore."
(pp. 49-50.)

The exception to the above allegations was that they are insufficient in law to constitute a defense.

The charter-party provides:

"Cargo to be *discharged* at port of destination
"at the average rate of not less than 20,000 super-
"ficial feet per running day, Sundays excepted.
"Lay days to commence from the time the vessel is
"ready to receive or discharge cargo, and written
"notice thereof is given to the party of the second
"part (charterer) or agent, and for each and every
"day's detention *by default of the said party of*
"*the second part* (charterer), or agent, $59.46 U. S.
"gold per day, *day by day*, shall be paid by the
"said party of the second part (charterer), or agent,
"to the said party of the first part (libellants),
"or agent.

"Vessel to discharge at a *safe anchorage ground*
"in Rio Bay, *designated by charterers*."

The only exceptions in the charter-party are "dangers of the seas, fires and navigation."

Two questions are presented:

1. Were the respondents in default?

2. Does the allegation that "libellants were prevented from discharging the cargo by reason of the acts of the public enemy" excuse the respondents' default?

I. The charterers were under an absolute engagement to designate a safe anchorage at which the vessel could discharge.

The language of the charter-party is: "Vessel to discharge at a *safe* anchorage ground in Rio Bay *designated* by *charterers*."

Ryan v. *Graham*, 1 Best & Smith, 773.
31 L. J., Q. B., 26.

Charter of a vessel from Swansea to "a safe port in Chili (with leave to call at Valparaiso); twenty-five working days for discharging, to commence from notice being given of the vessel's readiness to deliver.

The vessel arrived at Valparaiso and was ordered to Carrisal Bajo to discharge. Carrisal Bajo was a safe port by nature, but had been declared closed by the Chilian government in consequense of rebellion. Any vessel discharging there without a permit would be liable to confiscation. When the charter party was made both parties were ignorant of the fact that the government had closed any port. The order to discharge at Carrisal Bajo was *bonafide*, the cargo being intended for that port by the charterers.

The vessel lay at Valparaiso for thirty-eight days until a permit was obtained, and her owners sued the charterers for the detention and recovered.

> Wightman, *J.* (779). "As Carrisal Bajo "was a port into which a vessel could not "enter without confiscation, it seems to me "clearly not within the terms contemplated "by the parties * * * * * the charterers "must pay the damages occasioned by the "breach of contract in *not naming a safe* "*port*, to which they have made themselves "liable by the specific terms of the "contract."

Sleeper v. Puig, 17 Blatch., 36.

Judge Blatchford held that under a charter party providing "dispatch for loading at New York and

discharging at Havana," the risk of delay in obtaining a place of discharge at the mole was on the charterers and not on the vessel.

> (p. 40)—"That a delay in finding a place "to discharge is as much within the mischief "sought to be obviated by the requirement "of 'dispatch for discharging,' in the charter "party as a delay in receiving the cargo "after the vessel reaches its wharf; and "that the respondents are liable for all "delay from the time of reporting of the "vessel at her anchorage near the mole in "readiness to deliver the cargo."

To same effect is *Davies v. McVeagh*, L. R., 4 Ex. D., 265.

It is not necessary that the failure of the charterers to receive the cargo should be due to negligence on their part to constitute *default*. *Default* as used in the charter party means *failure* or *omission*.

Default is defined as follows:

Century Dictionary.

1. "A failing or failure; an omission of that which ought to be done, neglect to do what duty, obligation or law requires."

3. "A fault, an offense, a misdeed, a wrong act."

Abbott Law Dict. Vol. 1, p. 356.

"The neglect or omission of a duty, or failure to perform an obligation."

Burrill's Law Dict. Vol. 1, p. 459.

"Omission; neglect or failure." * * * * "Omission or non-performance of duty."

In almost every mortgage it is provided that the principal shall become due "upon default" in paying interest.

In the Statute of Frauds the word "default" occurs in the phrase "debt, default or miscarriage."

Browne on Statute of Frauds, § 155.

> "Perhaps the strictest etymological rule "would be that which was suggested by "Lord Ellenborough in Castling *vs.* Aubert, "2 East, 325, mainly that 'debt' and 'default' *both refer to a liability accruing "upon a contract*, but the former to such as "is already incurred, the latter to such as "may be incurred at a future time."

Sixteen Hundred Tons of Nitrate of Soda, 61 Fed. R., 849:

The Circuit Court of Appeals for the Ninth Circuit in this case construed an identical provision in a charter party.

The charter allowed for the loading and discharging thirty working lay days, to commence twenty-four hours after her inward cargo is discharged—and for every day's detention *by default* of charterer, demurrage, &c.

Vessel received instructions to load at Caleta Buena, in Chile, and while on her way there civil war broke out.

Gilbert, *J.*:

> "Was the delay in loading occasioned by "the *default* of the charterers. * * In "the absence of a clause limiting the liability of the charterers to cases where the detention shall occur from the *fault or default* of the charterers or from some accident or cause specifically named, the obligation to pay demurrage is an *absolute* "one. * * But in this case there is inserted in the demurrage clause a limitation of the liability of the charterers in "loading or discharging. It is stipulated "that they shall be answerable only from "detention which may result from their *default*. To what extent does this provision modify their obligation?
>
> "There is in the use of the word '*default*' "no necessary imputation of negligence.

"*As used in such an instrument it can "mean only the non-performance of con-"tract duty*, a failure of one of the contract-"ing parties to do that which he has con-"tracted to do."

P. 853:

"In the case of Dow *vs.* Hare (Fed. Cases "No. 4037a) an unreported decision of Judge "Hoffman in the D. C. for the N. D. of Cal. "*and affirmed on appeal* to the Circuit "Court, the charterer had chartered the "ship to carry a cargo of coal to the steamer "'Saranac.' When the chartered vessel ar-"rived at the designated port, the 'Saranac' "was not in port. *She had been wrecked "and lost at sea.* The vessel, after waiting "during her lay days and for several days "thereafter, discharged her cargo on the "wharf and brought suit for demurrage. "It was urged in defense of the action "that the charterers were not liable, in-"asmuch as the detention was not due "to their '*default*.' In delivering the "opinion, the Court said: * * By "the bill of lading the 'Saranac' was "the consignee to whom the coal was to "be delivered. The consequence of her un-"punctuality ought rather to be borne by "the party whose agent she was, and who "had particularly stipulated that she should "be ready to receive the whole cargo within "ten days after the ship arrived, rather "than the shipowner, who was a stranger to "the contract."

Booge v. *A Cargo of Dry Boards*, 42 Fed. R., 335.

Charter provided for demurrage for each and every day's detention *by default* of the charterers.

The detention was caused by rainy weather, which prevented the loading of kiln dried boards. Judge Benedict held this to be the default of the charterers, stating:

"The words 'by default of the party of "the second part,' mean the default in fur-"nishing 30,000 feet per day alongside the "vessel for the loading thereof."

It is not claimed that any wrongful act on the part of the master of the vessel prevented the respondents from receiving the cargo sooner than they did, or that he was in any way responsible for the delay.

The contention is that the same cause, namely, the acts of the public enemy which prevented the charterers or consignees from receiving, prevented the vessel from discharging the cargo, and that therefore the delay was not by default of the charterers.

But as has been shown, the obligation of the charterers was not only to receive the cargo but to designate a safe anchorage at which the vessel should discharge, and any delay in the performance of this obligation was as much at their risk as delay in the actual discharge.

To escape liability the charterers must show that they were prevented from discharging the cargo by the wrongful act or omission of the owner, or those for whom he is responsible.

Budgett v. *Binnington*, 25 Q. B. D., 320–327.

Williams, J.: "In the present case the "plaintiffs were not prevented from per- "forming this contract by any default of "the ship-owner, or those for whom he was "responsible. It was the action of the "stevedores and dockers which alike pre- "vented the plaintiffs and defendants from "doing their part in the unloading. This in "no way relieves the charterer or consignee "from the *absolute* contract to pay demur- "rage for delay and detention of the ship "during unloading.

"If the strike of the stevedores had re- "sulted from unreasonable conduct of the "master in refusing reasonable wages asked "by the stevedores, the case might have "been different; for then, perhaps, it might "have been said that the shipowner pre- "vented the charterers performing the con- "tract, and that the act of the shipowner

"was the *causa causans* preventing the "charterer; but even in such a case the "charterer would, in our opinion, have to "show *that he was actually prevented by* "*the default of the shipowner*, *i. e.*, that "there were no available means of perform- "ing the contract, notwithstanding the de- "fault of the shipowner. If such means "were available the charterer must avail "himself of them to discharge the ship and "take his remedy by suing the shipowner "for breach of contract, or he will be liable "to demurrage."

(*2*). The charter-party contains an absolute contract to pay demurrage for detention at the port of discharge, and the charterers are liable for such delay, even though the shipowners were unable to do their part in unloading.

(*a*) The number of lay days were fixed.

By the charter, the number of lay days given to discharge the cargo is fixed by computation. The cargo to be unloaded was 514,255 feet and the rate of discharge was to be 20,000 feet per day. The number of lay days was therefore fixed at twenty-six days, and with the like effect as if that number of days had been stated.

Hall v. *Eastwick*, 1 Lowell, 456.

Carver on Carriage by Sea, § 610.

Postlethwaite v. *Freeland*, 5 App. C., 617.

Blackburn, J. "In many of the cases "cited on the argument at the bar, the "charter-parties were of this nature, and "the question only was whether the lay "days had begun to run.

"Tapscott *v.* Balfour, L. R. 8, C. P. 46, "was of this nature, for although the "charter-party did not name a certain num- "ber of days, it provided that the ship was "*'to be loaded by the defendants at the rate* "*of 100 tons per working day,' and as the* "*burden of the ship was known and id cer-*

> " *tum est quod certum reddi potest, this was*
> " *equivalent to naming a certain number of*
> " *days.*"

(*b*) When the time for discharge is stipulated in the charter, or is fixed by it, so that it can be calculated beforehand, there is an absolute agreement on the part of the charterers to discharge her within that time, and he takes the risk of all unforseen circumstances.

Whatever apparent conflict may exist between the opinion of the District Court and that of the Circuit Court of Appeals upon the sufficiency of the defense pleaded is reconciled by the amendment of the pleadings in the Appellate Court.

The decision of the learned District Judge was based upon the fact that the original libel did not allege actual readiness on the part of the vessel or the designation of a safe achorage.

> He states (p. 31): " The libel does not
> " allege that the vessel was actually ready
> " to discharge at any time before the dis-
> " charge actually began. It only asserts
> " that notice of readiness was given. That
> " is a very different thing. Such notices
> " are often given by shipmasters in the
> " attempt to set demurrage running before
> " the ship is ready or able to perform her
> " obligation to discharge."

This omission was remedied by amendment. The amended libel alleged not only readiness on the part of the vessel and the designation of a safe anchorage by respondents' agent, but also the actual commencement of the discharge of the cargo upon the following day.

The authorities are unanimous in holding that when by a charter party or bill of lading the charterer or consignee undertakes to pay demurrage for detention and to receive the cargo within a certain time, he is liable for delay resulting from *vis major* or other unforeseen circumstances. As pointed out in the opinion by Judge Wallace the authorities cited by the learned counsel for appellants are all

distinguishable, in that in none of them was there an express contract to pay demurrage or an agreement for a fixed period within which the cargo should be loaded or discharged.

In *Empire Transit Co.* vs. *Phila. & R. C. & I. Co.*, 77 Fed. R., 919, decided by the Circuit Court of Appeals for the Eighth Circuit, the rule or principle governing this right to recover demurrage is concisely stated (with an exhaustive citation of authorities) as follows:

> "Demurrage, strictly speaking, can be "recovered only when it is expressly re- "served by the charter or bill of lading. "* * * But one who charters a vessel, "under a contract that is silent as to the "time of unloading and discharge, contracts "by implication that he will unload and "discharge her within a reasonable time or "with reasonable diligence. * * * * * * * "When the time for the discharge of the "vessel is stipulated, or is definitely fixed "by the charter or bill of lading, so that it "can be calculated beforehand, the charterer "thereby agrees absolutely to discharge her "within that time, and he takes the risk of "all unforeseen circumstances. * * * * * "And it is immaterial that the shipowner, "also, is prevented from doing his part of "the work within the agreed time, *unless* "*he is in fault.*"

Davis vs. *Wallace*, 3 Clifford, 131.

> "The settled rule is, where the con- "tract of affreightment expressly stipulates "that a given number of days shall be al- "lowed for the discharge of the cargo, *that* "*such a limitation is an express stipula-* "*tion that the vessel shall in no event be* "*detained longer for that purpose*, and "that if so detained it shall be considered "as the delay of the freighter, *even where* "*it was not occasioned by his fault, but* "*was inevitable.* Where the contract is "that the ship shall be unladen within a "certain number of days, it is no defence "to an action for demurrage that the over "delay was occasioned by the crowded

" state of the docks or by port regulations, " or government restraints. *Detention* of " the vessel for loading or discharging " longer than the time allowed by the con- " tract entitles the owner to the stipulated " demurrage, although it was *impossible* to " complete the work within that time by " natural causes. Randall *vs.* Lynch, 2 " Camp., 352; Barrett *vs.* Dutton, 4 Camp., " 233; Hill *vs.* Idle, 4 Camp., 327; Furnell " *vs.* Thomas, 5 Bing., 188.

Carver on Carriage by Sea, § 608.

" The undertaking as to the time which " the loading or discharge shall occupy *is* " *given by the freighter, not by the ship-* " *owner.* * * The promise is made by the " freighter *for the benefit of the ship-* " *owner.*"

§ **611.** "The difference between charters " in which a *specific time* is allowed, " whether for loading or unloading, and " those in which the lay days are wholly " undefined, is thus of great importance. " In the one case *the time is limited* without " regard to the circumstances under which, " when the time arrives, the contract has, " in fact, to be performed. * *

" When the time is definitely fixed, or is " described so as to be calculable before- " hand there is an *absolute* obligation on " the charterer to have the work completed " within that period, whatever circum- " stances occur. He is answerable although " the completion may have become *impos-* " *sible* owing to causes which have arisen " without any fault or omission on his part. " Thus he bears the risk of delay arising " from the crowded state of the place at " which the ship is to load or discharge " (Randall *vs* Lynch, 2 Camp., 352), or " from frost (Barrett *vs.* Dulton, 4 Camp., " 343), or bad weather (Thiis *vs.* Byers, " 1 Q. B. D., 244), preventing access to the " vessel; or from acts of the Government of " the place prohibiting export, or prevent- " ing communication with the ship (Parker " *vs.* Hodgson, 3 M. & S., 267; Blight *vs.* " Page, 3 B. & P., 295, n.)

"*And it is immaterial that the shipowner*
"*also is prevented from doing his part of*
"*the work within the agreed time; unless*
"*he is in fault. The charterer takes the*
"*risk.*"

Cargo ex Argos, 5 P. C., 161. Sir Montague E. Smith.

"The agreement to pay demurrage after
"24 hours clearly implies that the parties
"contemplated that the ship might be
"detained by his default to 'take out' the
"goods, and that it was not intended the
"master should land or take the risk of
"landing them. The prohibition to land
"the pertoleum, therefore, did not prevent
"the plaintiff (shipowner) from fulfilling
"his part of the contract."

"In Waugh *vs.* Morris (L. R., 8 Q. B.,
"202), the plaintiff recovered for the deten-
"tion of his ship, although *it was not*
"*possible to land the hay* anywhere in the
"port of London. The contract of the ship-
"per in that case does not in their Lord-
"ships' view, substantially differ from the
"defendants in the present."

Thiis vs. *Byers*, 1 Q. B. D., 244.

On the trial before Gove, J.. it appeared that deft. chartered plffs. vessel for a voyage from Pensacola "to a port in United Kingdom. In charter was the "clause, "16 working days to be allowed the said "merchants for loading at P. and *to be discharged* "*at such wharf or dock as charters may direct,* "*always afloat in 14 like days.*"

Vessel was ordered to Middleborough and arrived at the usual place of discharge in river Tees and began discharging. "It was the master's duty, by "the practice of the port to put the timber over the "ships side and form it into rafts, and the con-"signee then sent steam tugs to carry it away. "*After the discharging had begun rough weather* "*came on, during which the master, though ready,* "*was unable to put the timber over the side and* "*form it into rafts,* and consequently it was not

"possible for the charterers to take any timber "away, though the ship remained at her anchor- "age, *and the tugs could have towed the timber* "*away if it could have been formed into rafts.* "The unloading was thus delayed owing to the "rough weather four days."

A verdict was taken for the plaintiff which included £40 for demurrage and leave was given to move to reduce the verdict by £40 if the Court should be of the opinion that by the true construction of the charter deft. was not responsible for the delay occasioned by the bad weather.

Defendant's counsel contended :

> "The deft. is not liable for the delay in "unloading the ship where the unloading, "as here is the *common enployment* of the "ship and freighter. It was the duty of the "ship to discharge the timber over the side "and form it into rafts, and then the defend- "ant to send tugs and take it away. The "*default was in the ship*, for if the rafts had "been formed the tugs could have towed it "away. The unloading being the *common* "*employment* of both parties, neither is liable "for delay caused by *vis major*. Ford *vs.* "Cotesworth, L. R., 4 Q. B., 127 ; L. R., 5 "Q. B. 544. Herschell, Q. C., for plff. pointed "out (248) that as the master and crew were "*ready and waiting*, the delay was not "theirs."

The judgment of the court (Blackburn & Lush, *JJ.*, was delivered by Lush, *J.* (249) :

> "We took time to look into the authori- "ties, and are of the opinion *where a given* "*number of days* is allowed to the charterer "for unloading, *a contract is implied* on his "part, that, from the time the ship is at the "usual place of discharge *he will take the* "*risk* of any ordinary vicisitudes which "may occur to prevent him from releasing "the ship at the expiration of the lay days. "This is the doctrine laid down by Lord "Ellenborough in Randall *vs.* Lynch, 2 "Camp., 355, which was upheld by this

"Court and it has been accepted as the "guiding principle ever since: See Leer *vs.* "Yates, 3 Taunt., 387; Brown *vs.* Johnson "10 M. and W. 331, and the other cases "cited in the argument."

Davies vs. *Mc Veagh*, 4 Ex. Div., 265.

Charter: "Vessel to load in B. M. Dock or W. Dock." Vessel next day after charter was, as a matter of favor, admitted into W. Dock, but owing to regulations of dock authorities did not begin to load till 14 days later.

Charter gave 19 running days to load and discharge. Delay occurred in discharging, so that 20 days elapsed after the 19 running days—if calculated from the time of admission to dock.

Bramwell, *J.*

"When a ship is to take on a cargo at a "specified place of loading the responsibility "rests, not with the owner, but with the "charterers, if the specified birth is not in a "fit state to receive her upon her arrival at "the appointed time.

Postlethwaite vs. *Freeland*, 5 Ap. C., 617.

Blackburn, *J.*

"As the merchant, if not himself resident "at the port of discharge, at all events has "a consignee and correspondent there resi- "dent, he presumably knows all about the "means and appliances for discharging a "ship there, better than the shipowner. *It, "therefore, seems very reasonable that the "shipowner in making his bargain should "require the merchant to make an estimate "of the probable time of discharging the "ship, and take on himself the risk of that "time being exceeded;* and then the ship- "owner can fix the payment he is willing "to take with reference to this, and this has "long been done by providing lay days and "demurrage days for discharging. In the last "edition of Abbott on Shipping, published "while Lord Tenterden was living, it was "said (5 ed., 180) * * * 'And where "'the time is thus expressly ascertained

" ' and limited by the terms of the contract,
" ' the merchant will be liable to an action
" ' for damages, if the thing be not done
" ' within the time, although this may not
" ' be attributable to any fault or omission
" ' on his part, *for he has engaged that it*
" ' *shall be done.*'

" These last words are put in italics by
" Lord Tenterden. It still remains the more
" usual form of charter-party to insert lay
" days and demurrage days.

Leer vs. *Yates*, 3 Taunt., 387, Mansfield, *C. J.* Goods under other cargo could not be discharged within the lay days. Held, cargo owners liable for damages.

" But it is not in truth the fault of either
" the plaintiff or defendant that the goods
" could not be taken out."

Porteous vs. *Watney; Straker* vs. *Kidd* 3 Q. B. D., 226 Lush, *J.*

" Now, the only thing which prevented
" the delivery in the present case was the in-
" ability of the master *to get at the goods*
" because they were stowed at the bottom
" of the hold, and because the owners of
" the super-incumbent goods had neglected
" to take those goods away in proper time.
" Can this neglect of the other consignees
" be said to be the *default* of the master?
" If not, it is immaterial whose fault it was,
" *for the defendants undertook that whether*
" *they were able to get away their goods or*
" *not, they would pay demurrage if the*
" *ship was not cleared within the stipulated*
" *period*, the contract being as I have said
" an *absolute*, and not a conditional con-
" tract. Now, it is clear that *the master*
" was not in *default. He was ready and*
" *anxious to deliver.*"

S. C., 3 Q. B. D., 534. Affd. by Court of App. Theisinger, Cotton and Brett, *JJ.*

Brett, *J.* (543).

" The defendant is to pay unless it is the
" *fault* of the shipowner."

Randall vs. *Lynch*, 2 Camp, 352, Ld. Ellenborough:

> "The question is whether the detention "of the ship, arising from the inability of "the London Dock Co. to discharge her, is, "in point of law, imputable to the freighter, "and *I am of opinion that a person who "hires a vessel detains her, if at the end of "the stipulated time he does not restore her "to the owner.* He is responsible for all the "various vicissitudes which may prevent "him from doing so. * * * The defend- "ant is as much responsible for a delay "arising from the want of a berth as if it "had arisen from tempestuous weather, or "any other cause."

Barker vs. *Hodgson*, 3 Maule & Selwyn, 267: In consequence of an *infectious disorder* at Gibraltar, all intercourse with ships was prohibited and deft. could not load a cargo on brig Providence within the 60 running days allowed by the charter. Lord Ellenborough, *C. J.*

> "Is not the freighter the adventurer *who "chalks out the voyage* and is to furnish at all "events the subject matter out of which "freight is to accrue? * * But if in conse- "quence of events which happen at a foreign "port, the freighter *is prevented* from fur- "nishing a loading there, the contract is "neither dissolved, nor is he excused for "not performing it, but must answer in "damages."

Barrett vs. *Dutton*, 4 Camp., 333: Gibbs, *J.*, held that where a certain number of running days were allowed for loading, the freighter is liable for delay caused by the *impossibility of loading owing to ice in the river*, although the vessel could not have sailed if loaded.

Bessy vs. *Evans*, 4 Camp., 131: 30 days for loading and unloading cargo allowed. Discharge stopped by Custom officers. Lord Ellenborough:

> "At the expiration of the 30 days I think "you became liable for demurrage, although

> " you have been *prevented* from unloading
> " the goods by the wrongful act of a
> " stranger."

Grant vs. *Coverdale*, 9 P. C., 470: Charter of SS. Merrythorpe. Steamship was to proceed to Cardiff and East Bute dock and there load a cargo of iron; cargo to be supplied as fast as steamer can receive, except in case of frosts preventing the loading. The ship loaded part of her cargo. A frost set in, which made a canal which communicated with the dock impassable, so that cargo ready at a wharf on the canal could not be brought in lighters to the dock. Held (Affg. Ct. of Ap.) that the frost did not "prevent the loading." Lord Selbourne says, p. 477:

> " I infer from the finding of the referee,
> " that the whole *might have been done by*
> " *carting*, though I agree that it would have
> " been an expense which was preposterous
> " and unreasonable, if you were to look at
> " the interest of the charterer; but if the
> " charterer has engaged that he will do a
> " certain thing, he must, of course, pay the
> " damage which arises from his not doing
> " it, whatever the cause of his not doing it
> " may be, whether it be his not being willing
> " to incur an unreasonable expense, or
> " whether it be any other cause.

Budgett vs. *Binnington*, 25 Q. B. D., 320. Plaintiffs were endorsees of B/L for a cargo of barley shipped on S.S. Fairfield, "all conditions as per charter party," by which the cargo was to be taken from alongside the steamer at freighters' expense and risk. Seven running days were allowed for unloading. B/L contained the usual exceptions. but neither it nor C/P contained any reference to strikes.

The F. arrived at Bristol and her lay days commenced Nov. 25th.

At Bristol, grain cargoes in bulk are discharged by the *joint* action of the consignee and shipowner. The consignee furnishes bags and "*bushellers*" to fill

the sacks, and the shipowner hoists them to the deck and put them on scales and consignee weighs them. Different stevedores were employed by the shipowner and consignee. On Nov. 28 the laborers employed by both firms of stevedores struck and no cargo was discharged until Dec. 4. The shipowner claimed demurrage and consignee paid £147 under protest, and sued to get it back.

The jury found that the shipowners were not ready to perform their part of the discharge, and the judge left the parties to move for judgment.

Willliams, *J.*—"The fact is that the obli-
"gation of the consignee to pay demurrage
"is '*absolute*,' as was decided in Thiis *vs.*
"Byers, 1 Q. B. D. 244."

"*The readiness and willingness of the*
"*master to make delivery is not the con-*
"*sideration of or a condition precedent to*
"*the undertaking to pay demurrage for the*
"*detention of the ship*, and this being so it
"is not sufficient to relieve the consignee
"of the obligation to pay demurrage, that he
"should show that the master was *unable*
"to perform some obligations undertaken
"by him in the charter party; *but it must*
"*appear that the consignee was prevented*
"from discharging the ship within the time
"allowed for unloading *by the act of the*
"*master*, ar those for whom *he* was responsi-
"ble. * * *

"In the present case the plaintiffs were
"not prevented from performing their con-
"tract by any *default* of the shipowner, or
"those for whom he was responsible. It
"was the action of the stevedores and
"dockers, which alike prevented the plain-
"tiffs and defendants from doing their part
"in the unloading. This is no way relieved
"the charterers from the *absolute* contract
"to pay demurrage for the delay and de-
"tention of the ship during unloading."

(1891) 1 Q. B., 36, on appeal.

Esher M. R. "This is a contract by the
"freighter, by which he undertakes under

"certain circumstances to pay demurrage. "* * It has been held that the demur- "rage contract, *where a fixed number of* "*lay days is mentioned*, is a contract by "the freighter, that *if the ship is detained* "*over those days, he will pay demurrage* "*for so long as the ship is in such a condi-* "*tion that she cannot be handed back for* "*the use of the shipper* (*shipowner*?) This "has been called an *absolute* and independ- "ent contract, and it is obvious that a con- "trast is intended to be drawn between "such a contract and a conditional one, *and* "*that by an absolute contract is meant an* "*unconditional one.* The only condition "attached to it is, that the lay days shall "have commenced and run out, and that "condition being fulfilled, the obligation "arises.

"*Directly the shipowner shows this state* "*of facts, he has proved his case*, and it "lies on the other side to show not that there "has been no breach of contract, but *that* "*he is excused from the performance*—in "other words, his case is one of confession "and advoidance, *and the whole burden of* "*proof is on him.* * *

P. 39.

"*Of this I am certain, that if the ship-* "*owner is prevented from carrying out his* "*share of the discharge by the acts of per-* "*sons over whom he has no control, the case* "*comes within the same category as the* "*case of non-delivery caused by some physi-* "*cal misfortune over which he has no con-* "*trol.* In such a case it has been decided "that he is not prevented from enforcing "the contract of the freighter—as, for in- "stance, in the case of prevention by "weather or the acts of other consignees pre- "venting a lower cargo being taken out of "the vessel. * * That reduces the matter "to the question whether there has been "*default* by any persons for whom the de- "fendants are responsible. * * The ship- "owner had no control over these workmen, "and is not responsible for the consequences

"of their acts, and consequently there is "nothing to relieve the consignee from the "*absolute* contract to pay demurrage. This "is no new principle of law but only a ques- "tion whether the facts bring this case "within a recognized rule or law."

Lindley, L., J.:

"On whom does the risk of strikes fall "in a contract such as this, where the risk "is not expressly excepted from the risks "which the freighter is to bear? The con- "tract was to discharge the ship, in a cer- "tain number of days. * * The stipula- "tion is in terms unconditional and it has "frequently been call an *absolute* contract, "by which I understand an unconditional "contract. * *

"It is argued that * * the shipowner "shall be able and willing to do his part in "the unloading, and that if he is not so able "and willing the freighter is relieved from "the consequences of a breach on his part.

"Such a statement is far too wide; for if it "were true, the cases of Thiis *vs.* Byers, 1 Q. "B. D., 244; Porteous *vs.* Watney, 3 Q. B. "D., 227,534; and Straker *vs.* Kidd, 3 Q. "B. D., 223, would have been improperly "decided."

Lopes, *J.* (41):

"There is an essential difference between "the cases where a specific time is allowed, "for loading and unloading, and cases "where the lay days are not defined.

"In the former case the time is limited "without reference to subsequent events. " * * This is then, as I have said, an "*absolute* contract on the part of the mer- "chant to have the cargo unloaded within a "specified time.

"*In such case the merchant takes the risk.* " * * I can find no *default* in the ship. "The strike was an unforseen occurence "over which the ship had no control."

III.

The discharge of the cargo was not prevented by the act of the public enemy.

This question having been heard on the exception to the sufficiency of the defense, the question as to the truth of the allegations of the answer was not before the Court.

The amended libel alleged actual readiness on the part of the vessel, the designation of a safe anchorage by the charterers, and the actual commencement of the discharge of the vessel at such anchorage, and its continuation without serious interruption for a considerable period. The proofs fully established and substantiate the allegations of the libel in this respect.

It is shown that the vessel arrived on August 30th, gave notice of readiness to discharge on September 4th; the charterers designated a safe anchorage, to which the vessel proceeded on September 5th; on September 6th the discharge of cargo was begun and proceeded with almost daily, until September 30th.

Capt. Wilson testified that the revolution or hostilities did not break out until after he had given notice to the charterers, and that at no time did the firing in the harbor or any act or hostilities prevent the discharge of cargo (p. 77). While the interruption of business, consequent upon the state of war existing, was undoubtedly the indirect cause of the failure of the consignees to receive and remove the cargo more rapidly than they did, the evidence establishes that the acts of the enemy did not in any manner prevent the discharge of same by the vessel.

Even, therefore, if the defense pleaded, would have been good if established, it appears that the allegations of the fifteenth article of the answer are not, in fact, true.

IV.

The defense of an account stated and satisfaction of all claims under the charter-party was not established.

The contention of the appellants is that a payment of £515 6s. 5d. made by their agent to Phipps Bros. & Co., for the libellants, was received and accepted in full satisfaction of all claims under the charter.

(1) Captain Wilson testified that when the lay days expired, he called on the consignees and stated that he intended to claim demurrage, and was told that he could not claim any demurrage on account of the revolution (pp. 77–79).

Hime admits that the captain called on him about the delay in discharging the cargo, and that he (Hime) told him that he had to obey the government's orders and that he had nothing to do with it (p. 66).

How can it be contended that the payment of £515 6s. 5d. made by the consignees, was in discharge of a liability, which, they insisted, did not exist?

Under the terms of the bill of lading the master could not enforce against the cargo or recover from the consignees damages for delay caused by the state of hostilities, and his claim for same was met by a refusal to pay based upon that express ground.

What was then left for him to do but to enter his protest before the Consul and reserve his owner's rights?

It is shown that no statement or account of the demurrage was presented by the master or by Phipps Bros. & Co. to the consignees, and that the only account rendered was the one prepared by the consignees and presented to Phipps Bros. & Co. accompanying the payment of the £515 6s. 5d.

That statement appears at pages 69–70 of the record. It is for freight and for freight alone and shows that the £515, 6s. 5d. was the exact amount of the *freight* due under the charter-party, less the

amount of a prior payment on account. The acceptance of the admitted balance of freight due, shown by such account cannot be considered as a settlement of *demurrage.*

Perkins v. *Hart*, 11 Wheaton, 237–257.

> "A settled account is only *prima facie* "evidence of its correctness. It may be "impeached by proof of unfairness or mis- "take in law or in fact; *and if it be con-* "*fined to particular items of account, it* "*concludes nothing in relation to other* "*items not stated in it.*"

Harden v. *Gordon*, 2 Mass., 562.

Some stress was laid by the appellants upon the letter of the libellants to Phipps Bros. & Co., dated October 11, 1893 (p. 94), in which they call attention to the fact that there is no exception in the charter-party covering the occurrences at Rio, and suggesting that the consignees may be liable for the delay. This letter, however, should be read in connection with the testimony of the libellant, Burrill, (p. 82).

> "Bnt at that time I wasn't aware that the "bill of lading didn't refer the charter-party. "If I had known that of course I would have "known too much to ask them to collect "demurrage."

(2.) There is no proof of the authority of either the master or Phipps Bros. & Co. to waive the claim for demurrage or to enter into an accord and satisfaction.

If purporting to act under a power of attorney, it is obvious that the powers of the special agent would be restricted to the four corners of the paper.

Dunlap's Paley's Agency, p. 201.

Does it make any difference that the paper is called a charter-party?

The charterers had the charter and that told them what their contract obligations were, and that they were dealing with an agent whose *duty was expressed in the paper*, viz., collect the agreed freight and demurrage.

Dunlap's Paley's Agency, p. 201.

"Nor can an agent without express authority compound a debt."

Abbott on Shipping (12 Eng. ed.), p. 89:

"But if the owners themselves have made "a *special contract* for the employment of "of their ship, the master cannot, by the "general and implied authority of his "character as master only, annul such a "contract and substitute another for it, "with the other contracting party."

Sickens v. *Irving*, 7 Com. B., 165.

Williams, *J.* (171):

"Now there can be no doubt that an "agent appointed to load a cargo at a foreign port has authority to do all acts that "are necessary for the performance of the "contract; and also to vary the mode of "performance if any exigency arises, provided the contract be substantially performed.

"But there is no ground for contending "that he has by law any implied authority "to substitute a new contract, to substitute "one sort of commodity for another, sugar "for salt for instance, or to appoint a different place of loading from that contemplated by the charter party. It is quite "new to me to hear it suggested that he has "such authority, and I cannot but think it "would be very mischievous if the agent's "authority could be so extended as thus to "vary the contract of his principal."

Byles, *J.* (173):

"It was contended that the agent necessarily had an implied authority to deviate

"from the strict letter of the charter party,
"or, in other words, that they had an im-
"plied authority to direct the loading of a
"different article in a distant port. It
"seems to me, however, that the agents had
"no such authority in point of law."

Earl, *C. J.*:

"I think this decision is one of very con-
"siderable importance, for, if Mr. Wilde
"had succeeded in his argument, it might
"have thrown doubt upon the well-known
"and to the mercantile world, most import-
"ant rule, that an agent must be strictly
"limited by his authority."

The only evidence bearing upon the question of the authority of Phipps Bros, & Co is that of the witness Hime, who testified that the Companhia Industrial do Brazil received a letter from Phipps Bros. & Co. in which the latter stated that they were the attorneys for the owners of the vessel, instructed the company not to give the captain any money but to liquidate the accounts of the vessel with them. The letter itself was not produced, the witness stating his recollection of its contents (p. 66).

This testimony is clearly insufficient to sustain a contention that Phipps Bros. & Co. had authority to waive or compromise the libellants' right to demurrage under the charter party.

Lastly, The decree of the Circuit Court of Appeals should be affirmed with interest and costs.

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